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No. 896.

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

FRANK MASHAK,
Petitioner,

vs.

DOROTHY DELORES PASTERNAK,
Respondent.

## PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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In Reply to Respondent's Brief that no final judgment has been entered in this case, it omits the Constitutional questions raised in the trial court before the second jury trial, which were briefed and argued on appeal, and summarily rejected by the Missouri Supreme Court on the hitherto unknown "public policy" invented by the court for the purpose. The Missouri Supreme Court has with finality closed off any consideration at the state level of

Petitioner's rights under the United States and Missouri Constitutions. It has disobeyed the Missouri Constitution, 1945, **V. A. M. S., Article V, § 9,** which provides:

> **"Section 9. Transfer of Causes to Supreme Court En Banc.**—A cause in the supreme court shall be transferred to the court en banc when the members of a division are equally divided in opinion, or when the division shall so order, or on application of the losing party when a member of the division dissents therein, *or a federal question is involved,* or pursuant to supreme court rule." (Italics ours.)

After Petitioner timely filed his Motion for a Rehearing or to Transfer the Cause to the Court en banc which was overruled on September 11, 1967 (R. 707, 710; Petition for a Writ of Certiorari herein, pages 2 and 10) the judgment became final insofar as Petitioner could go in the state courts, Rule 83.16, Missouri Rules of Civil Procedure (effective April 1, 1960), Vernon's Annotated Missouri Statutes.

The result of a third retrial has been predetermined by the decision of the Missouri Supreme Court on the erroneous basis that constitutional questions do not exist merely because they chose to "reject" them. The trial court must follow the final decision of the Missouri Supreme Court and when the constitutional questions are again raised, either before, or in the third retrial of the case in the trial court, would avail nothing and would be futile, because the trial court would reject such constitutional questions raised again, on the obvious grounds that the decision complained of is the "law of the case" and *res adjudicata,* and binding on the trial court.

Where the Supreme Court of Missouri will not obey the mandate of the Missouri Constitution, 1945, Article V, § 9, V. A. M. S., aforesaid; will not follow its own Code

of Judicial Ethics, Rule 1.19, Missouri Cases, 407-408 S. W. 2d XIX, XXII; will not consider evidence, but substitutes presumptions without basis in fact for evidence; will not establish proper guidelines or standards to regulate another trial of the same issues after repeated requests, and creates a new "public policy" to overthrow established case law, and summarily rejects constitutional questions, is not the outcome of the next trial inevitable?

This situation is analogous to the facts recited by Justice Black in **Mills v. State of Alabama,** 384 U. S. 214, at 217, 218. As we read said case, where the result of a retrial is inevitably futile, the judgment ordering said retrial is "final" within the meaning of 28 U. S. C. § 1257 (3). That is the situation in the instant case.

The Supreme Court of Missouri has refused to consider the evidence. It has listed the combination of three presumptions which although entirely theoretical and against the evidence, all spring from Petitioner's admission that he wrote the Will, to form an insurmountable obstacle to his inheriting. The court has spelled out that "his conduct is the issue" without evidence, creating another presumption detrimental to him on a third trial. The rejected Constitutional questions, now *res adjudicata,* will not be available in the future, and the decision will not allow Proponent to win in the third trial under these conditions. For these reasons the result is inevitable, and hence the judgment is "final" according to **Mills v. State of Alabama,** *supra,* 384 U. S. 214, at 217, 218, and this Court under its discretionary power has jurisdiction to issue certiorari under 28 U. S. C. § 1257 (3). The questions raised are of public importance and are of such nature that the exercise of such power is peculiarly appropriate, **Ex Parte Republic of Peru,** 318 U. S. 578, 582, 586.

## CONCLUSION.

For the reasons set forth in the original petition, petitioner prays the petition for a writ of certiorari be granted.

Respectfully submitted,

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